INTERIOR BOARD OF INDIAN APPEALS

Cora Jean Jech v. Eastern Oklahoma Regional Director,
Bureau of Indian Affairs

41 IBIA 63 (05/16/2005)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
801 NORTH QUINCY STREET
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ARLINGTON, VA 22203

CORA JEAN JECH, Appellant,	:	Order Affirming Decision
v.	:	
	:	Docket No. IBIA 03-96-A
EASTERN OKLAHOMA REGIONAL DIRECTOR, BUREAU OF INDIAN AFFAIRS, Appellee.	:	May 16, 2005

Cora Jean Jech (Appellant) appeals from a March 6, 2003, decision of the Eastern Oklahoma Regional Director, Bureau of Indian Affairs (Regional Director; BIA), concerning an inter vivos trust established by Nancy E. Rogers (Rogers), a now-deceased Osage. For the reasons discussed below, the Board affirms the Regional Director's decision.

In 1978, Congress enacted legislation which, among other things, authorized the establishment of inter vivos trusts covering Osage headrights and other Osage property. Act of Oct. 21, 1978, 92 Stat. 1660, 25 U.S.C. § 331 note (1978 Act). Section 6 of the 1978 Act, 92 Stat. at 1662, provides in relevant part:

> (a) With the approval of the Secretary of the Interior, any person of Osage Indian blood, eighteen years of age or older, may establish an inter vivos trust covering his headright or mineral interest except as provided in section 8 hereof; surplus funds; invested surplus funds; segregated trust funds; and allotted or inherited land, naming the Secretary of the Interior as trustee. * * * Said trust shall be revocable and shall make provision for the payment of funeral expenses, expenses of last illness, debts, and an allowance to members of the family dependent on the settlor.

On April 16, 1999, Rogers executed a document titled Revocable Trust Agreement (Agreement), in which she established an inter vivos trust covering her Osage headright interest and her funds on deposit at the Osage Agency, BIA. She named the Secretary of the Interior as trustee and provided that, upon her death, her entire estate would vest in Jodell Marie Heath and Glen George Jech, II. The Agreement was approved by the Acting Superintendent, Osage Agency (Superintendent), on May 13, 1999.

Rogers died on January 29, 2001. 1/ By notice dated February 27, 2001, the Superintendent advised interested parties of their right to contest the Agreement and stated that, absent a contest, the trust assets would be distributed in accordance with the Agreement. On March 21, 2001, Appellant filed a contest to the Agreement. She claimed to be Rogers' natural daughter and sole heir at law and contended that the trust was invalid under Oklahoma law because it failed to provide for her.

On June 6, 2002, the Superintendent rejected Appellant's contest, holding that Oklahoma law did not apply to the trust. Appellant appealed to the Regional Director, who affirmed the Superintendent's decision on March 6, 2003. Appellant then appealed to the Board. Appellant and the Regional Director filed briefs. 2/

Appellant argues:

> [The Regional Director's decision] fails to properly apply section 6 of the [Act of June 28, 1906, 34 Stat. 539 (1906 Act)] and fails to acknowledge that Oklahoma law applies to the descent of all land, money or mineral interests of any member of the Osage tribe. When Oklahoma law is properly applied to this case, the *inter vivos* trust must fail. First, Oklahoma law does not allow an *inter vivos* trust to disinherit a child. Second, Section 6 of the 1906 act prohibits the descent of property to any other than heirs, making Nancy Rogers' attempted *inter vivos* trust void. Finally even if an *inter vivos* trust could omit [Appellant] from her inheritance from Ms. Rogers, the Oklahoma law prohibits any omission of an heir, even in a trust, where the omission is not specifically stated.

Appellant's Opening Brief at 3-4. Most of Appellant's arguments concern the validity of Rogers' trust under Oklahoma law which, she contends, is made applicable to Osage inter vivos trusts by section 6 of the 1906 Act. In her argument denoted "second," she seems to contend that the trust is invalid by direct application of section 6 of the 1906 Act, although she also contends that the "heirs" to which she refers are to be determined under Oklahoma law. In any event, all of her arguments ultimately depend upon a theory that section 6 of the 1906 Act applies to Osage inter vivos trusts.

1/ Appellant states that Rogers died on Jan. 31, 2001. Appellant's Opening Brief at 3. However, several documents in the record, including a court order, show Rogers' date of death as Jan. 29, 2001. The exact date of death is not critical to any issue in this appeal.

2/ Jodell Marie Heath and Glen George Jech, II, participated in the proceedings before the Superintendent and the Regional Director but have not participated before the Board.

In the 1906 Act, Congress provided for, among other things, allotment of the Osage Reservation to enrolled members of the Osage Tribe. 3/ Section 6 provides:

> That the lands, moneys, and mineral interests, herein provided for, of any deceased member of the Osage tribe shall descend to his or her legal heirs, according to the laws of the Territory of Oklahoma, or of the State in which said reservation may be hereinafter incorporated, except where the decedent leaves no issue, nor husband nor wife, in which case said lands, moneys and mineral interests must go to the mother and father equally.

Appellant contends that, under this provision, Oklahoma law "**generally applies to all descents** of 'the lands, moneys, and mineral interests' * * * of 'deceased members of the Osage Tribe.'" Appellant's Opening Brief at 6 (Emphasis in original). It is clear from her arguments that Appellant construes the term "descend," as it is used in section 6 of the 1906 Act, to include any method, including passage by inter vivos trust, by which the property of a deceased Osage passes to someone else.

The term "descend" is commonly used to refer to the passage of property by intestate succession. See, e.g., Black's Law Dictionary (8th ed. 2004), which provides only one definition of the term: "To pass (a decedent's property) by intestate succession." Appellant greatly expands upon the common understanding of the term yet offers no authority to support her broad construction, even though all of her arguments depend upon it. Further, as discussed below, she fails to show that Congress had such a broad construction in mind when it enacted the 1906 Act or at any time thereafter.

As indicated above, Appellant contends that "Section 6 of the 1906 act prohibits the descent of property to any other than heirs, making Nancy Rogers' attempted *inter vivos* trust void." The essence of this argument is that Osage testators and settlors are required to designate their beneficiaries in accordance with the Oklahoma law of intestate succession, thus defeating the whole purpose of wills and inter vivos trusts. Undoubtedly, if Congress had intended such an extraordinary limitation upon the rights of Osage testators and settlors, it would have so stated.

As to the applicability of Oklahoma law, Appellant contends that, "[b]ecause Section 6 of the 1906 Act generally states that Oklahoma law applies to all descents, which the Decisions

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3/ See Smith v. Muskogee Area Director, 16 IBIA 153, 157 (1988), for a brief discussion of the 1906 Act.

and commentators agree includes *inter vivos* trusts, [4/] there was no need for Congress to specifically state [in the 1978 Act] that Oklahoma law applies to these trusts." Appellant's Opening Brief at 6. She then discusses Chouteau v. Acting Muskogee Area Director, 34 IBIA 57, recon. denied, 34 IBIA 112 (1999), a case in which the Board held that BIA's approval of an Osage inter vivos trust was subject to administrative appeal although the 1978 Act did not specifically so provide.

In the portion of Choteau relied upon by Appellant, the Board stated:

> The differences between sections 5(a) [establishing procedures for the approval of Osage wills] and 6 of the 1978 Act do not require a conclusion that Congress intended to prohibit administrative challenges to decisions under section 6. In section 5(a), Congress established unique procedures for challenging Osage wills. Obviously, if Congress intended to make Osage wills subject to unique procedures, it was necessary that it delineate those procedures. However, there was already a general procedure for challenging BIA decisions—25 C.F.R. Part 2 and 43 C.F.R. Part 4, Subpart D. Therefore, unless it also intended to provide unique procedures for challenging Osage inter vivos trusts, Congress did not need to delineate additional administrative review procedures in section 6.

34 IBIA at 60.

Attempting to analogize this case to Choteau, Appellant contends that Congress did not need to specify in 1978 that Oklahoma law was applicable to Osage inter vivos trusts, and thus "[t]he fact that the 1978 Act is silent on this issue is meaningless." Appellant's Opening Brief at 6. Appellant's attempted analogy to Choteau rests on the premise that Congress considered section 6 of the 1906 Act applicable to Osage inter vivos trusts.

It is apparent, however, that Congress has never considered section 6 of the 1906 Act applicable to anything other than intestate succession. In 1912, Congress authorized the

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4/ Appellant provides only one citation in support of her broad assertion concerning "Decisions and commentators." Her single citation is to a statement in Cohen's Handbook of Federal Indian Law (1982) at 792 n.200, which describes Osage inter vivos trusts as "will substitutes." Nothing in this statement remotely suggests that the writer considered section 6 of the 1906 Act applicable to Osage inter vivos trusts.

disposition of Osage property by will, 5/ an action which would have been unnecessary had such dispositions already been authorized by the 1906 Act. In 1978, Congress authorized dispositions by inter vivos trusts, an action which likewise would have been unnecessary had such dispositions been authorized by the 1906 Act.

Nothing in the 1978 Act or its legislative history indicates that Congress believed inter vivos trusts had been authorized in 1906. To the contrary, the legislative history of the 1978 Act makes it plain that Congress believed such trusts were not authorized under then-existing law. See H.R. Rep. No. 95-1459 (1978) at 4:

> Under current laws, an Osage Indian can only dispose of his headright or mineral interest by testamentary instrument which is approved subsequent to his death by the Secretary of the Interior. * * * The tribe requested authority to permit members of the Osage tribe to execute testamentary instruments in the nature of a trust which would provide the settlor with an opportunity prior to his death to firmly establish the disposition that would be made of his property. Section 6 [of the 1978 Act] provides this authority.

Accord S. Rep. No. 95-1157 (1978) at 8.

Further, nothing in the 1978 Act or its legislative history indicates that Congress had any intent to make Oklahoma law applicable to Osage inter vivos trusts. Indeed, the language of the 1978 Act evidences the opposite intent. The fact that Congress explicitly referred to Oklahoma law in subsection 5(a), concerning Osage wills, and did not do so in section 6, concerning Osage inter vivos trusts, indicates that Congress knew how to make Oklahoma law applicable to Osage testamentary documents but chose not to do so in the case of inter vivos trusts.

Appellant fails to show that section 6 of the 1906 Act applies to Osage inter vivos trusts. Thus she also fails to show that Oklahoma law is made applicable to Osage inter vivos trusts by

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5/ Section 8 of the Act of Apr. 18, 1912, 37 State 86, 88, provides:

"That any adult member of the Osage Tribe of Indians not mentally incompetent may dispose of any or all of his estate, real, personal, or mixed, including trust funds, from which restrictions as to alienation have not been removed, by will, in accordance with the laws of the State of Oklahoma: *Provided*, That no such will shall be admitted to probate or have any validity unless approved before or after the death of the testator by the Secretary of the Interior."

This provision was amended in subsection 5(a) of the 1978 Act, which requires, among other things, that an Osage will be "executed in accordance with the laws of the State of Oklahoma." 92 Stat. 1661.

section 6 of the 1906 Act. She makes no other argument for the applicability of Oklahoma law to Osage inter vivos trusts. 6/ Nor does she contend that Rogers' trust is invalid under any other law.

The Board finds that Appellant has failed to show error in the Regional Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Regional Director's March 6, 2003, decision is affirmed.

I concur:

// original signed
Anita Vogt
Senior Administrative Judge

// original signed
Steven K. Linscheid
Chief Administrative Judge

6/ Given Appellant's failure to show that Oklahoma law is applicable to the trust established by Rogers, there is no need to reach her arguments concerning the validity of the trust under Oklahoma law.